UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN ALLAN SCERE,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
NY-0752-14-0157-A-1

DATE: February 22, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Jonathan Bell, Esquire, Garden City, New York, for the appellant.

Julie L. Kitze, Philadelphia, Pennsylvania, for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member
Member Leavitt issues a separate dissenting opinion.

FINAL ORDER

¶1 The agency has filed a petition for review of the initial decision, which granted the appellant's motion for an award of attorney fees. Generally, we grant petitions such as this one only in the following circumstances: the initial decision

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision.

BACKGROUND

¶2 The appellant served as a Federal Air Marshal (FAM) with the agency's Transportation Security Administration (TSA). *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-I-1, Initial Appeal File (IAF), Tab 5, Subtab 4a. In January 2014, the agency removed him for his inability to meet a condition of employment; namely, his inability to maintain a Government travel card. *Id.*, Subtabs 4a, 4b. The appellant timely appealed his removal to the Board and requested a hearing. IAF, Tab 1.

¶3 Following the requested hearing, the administrative judge issued an initial decision mitigating the removal to a reassignment. IAF, Tab 23, Initial Decision (ID). Specifically, the administrative judge found that the agency proved its charge because the bank issuing the appellant's travel card cancelled it and declined to reinstate it upon the appellant's request; thus, the appellant was not able to meet a condition of employment as a FAM. ID at 4-19. She also found the appellant's affirmative defense that the agency violated his due process rights to be without merit and that the agency proved a nexus between the appellant's

conduct and the efficiency of the service. ID at 19-20. However, the administrative judge found that the agency's penalty was not entitled to deference because the deciding official did not properly consider the *Douglas* factors and, given the mitigating factors present, the penalty of removal was not appropriate.[2] ID at 20-22. Accordingly, the administrative judge ordered the agency to cancel the removal action, effective January 8, 2014, and assign the appellant to a position for which he was qualified in the agency's New York Field Office that did not require the use of a Government travel card and would result in "the least reduction in grade and pay" from his FAM position. ID at 22. She also directed the agency to pay the appellant the appropriate amount of back pay, interest, and other benefits. *Id.*

¶4 The agency appealed the initial decision to the full Board; however, the two sitting Board members could not agree on the disposition of the petition for review, and the initial decision became the final decision of the Board. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-I-1, Order (Sept. 9, 2016).

¶5 On November 10, 2016, the appellant timely filed a motion for attorney fees in which he sought an award of fees and costs incurred in connection with the initial appeal and associated petition for review, which the agency opposed.[3] *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-A-1, Attorney Fee File (AFF), Tabs 1, 9. The appellant then requested an

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[2] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board articulated a nonexhaustive list of factors to be considered when evaluating the penalty to be imposed for an act of misconduct.

[3] Shortly after filing the motion for attorney fees, the appellant also filed a petition for enforcement, which the administrative docketed as a separate compliance matter and granted in part. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-C-1, Compliance Initial Decision (Sept. 5, 2017). The agency's petition for review of that compliance initial decision is addressed in a separate decision.

additional award of fees incurred in responding to the agency's opposition to the motion. AFF, Tab 10. In an addendum initial decision, the administrative judge granted the motion as to the requested attorney fees and denied the motion as to the requested costs for deposition transcripts. AFF, Tab 11, Addendum Initial Decision (AID). Specifically, the administrative judge found that the appellant was the prevailing party in the underlying litigation and incurred attorney fees pursuant to an existing attorney-client relationship. AID at 9-10. The administrative judge further found that an award of attorney fees was warranted in the interest of justice because the agency knew or should have known that it would not prevail on the merits, and the amount of fees claimed was reasonable. AID at 10-16. She ordered the agency to pay $108,225 in attorney fees to the appellant.[4] AID at 16.

¶6 The agency has filed a petition for review of the addendum initial decision, which the appellant has opposed. *Scere v. Department of Homeland Security*, MSPB Docket No. NY-0752-14-0157-A-1, Petition for Review File (APFR File), Tabs 1, 3. The agency has filed a reply to the appellant's opposition. APFR File, Tab 4. On review, the agency argues that the administrative judge lacked the authority to order an award of attorney fees, the appellant could not show that he was the prevailing party, an award of fees was not in the interest of justice, and the amount of fees claimed was not reasonable. APFR File, Tab 1. As set forth below, we find that the agency has not shown error in the administrative judge's award of fees.

[4] The administrative judge rounded the total time each attorney spent on the case to the nearest hour, resulting in a fee award of $108,225. *See* AID at 16. Neither party has disputed this method of calculation.

DISCUSSION OF ARGUMENTS ON REVIEW

The administrative judge had the authority to award attorney fees incurred in connection with the underlying initial appeal and petition for review.

¶7 To establish an award of attorney fees under 5 U.S.C. § 7701(g)(1), an appellant must show that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. *Driscoll v. U.S. Postal Service*, 116 M.S.P.R. 662, ¶ 7 (2011). Here, there is no dispute that an attorney-client relationship existed and that the appellant incurred fees in connection with his appeal.

¶8 The agency argues that the administrative judge lacked the authority to order the appellant's reassignment; thus, the administrative judge did not issue an enforceable order and lacked the authority to award attorney's fees based on the order. APFR File, Tab 1 at 12-14. An administrative judge's findings in an initial decision that become final on the merits should not be reevaluated in a proceeding on a motion for attorney fees. *Capeless v. Department of Veterans Affairs*, 78 M.S.P.R. 619, 622-23 (1998). Accordingly, we decline to reconsider the merits of the initial decision.

¶9 The Board has the authority to require an agency to pay reasonable attorney fees incurred by an appellant pursuant to 5 U.S.C. § 7701(g)(1). Section 7701(g)(1) applies to TSA under 49 U.S.C. § 40122(g)(2)(H). *See* 49 U.S.C. § 114(n); *Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 9 (2005) (holding that the Federal Aviation Administration personnel management system authorized under 49 U.S.C. § 40122 shall apply to TSA, except to the extent that the Under Secretary of Transportation for Security modifies that system as it applies to TSA employees). Accordingly, the administrative judge had the authority to order the agency to pay reasonable attorney fees incurred in connection with the appellant's initial appeal and related matters.

The administrative judge properly found that the appellant was the prevailing party in the underlying appeal.

¶10 The agency's argument that the appellant did not obtain an enforceable order, and thus could not be considered a prevailing party, similarly fails. APFR File, Tab 1 at 14-15. As set forth above, the order to reassign the appellant became the Board's final decision, and the agency cannot now collaterally attack that decision. *See Capeless*, 78 M.S.P.R. at 622-23. An appellant is considered to have prevailed in a case and to be entitled to attorney fees only if he obtains an enforceable order resulting in a "material alteration of the legal relationship of the parties." *Southerland v. Department of Defense*, 122 M.S.P.R. 51, ¶ 9 (2014); *Baldwin v. Department of Veterans Affairs*, 115 M.S.P.R. 413, ¶ 11 (2010) (citing *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 604 (2001)). The extent of relief that an appellant receives on his claim does not affect whether he is a prevailing party. *Southerland*, 122 M.S.P.R. 51, ¶ 9. Here, the administrative judge's order reversing the removal, mitigating the penalty, and ordering the agency to reassign the appellant with back pay and other benefits, which the Board affirmed, constituted an enforceable order resulting in a material alteration of the legal relationship between the parties. *See Driscoll*, 116 M.S.P.R. 662, ¶¶ 7-9 (finding that the appellant was a prevailing party when one charge was not sustained and the penalty of removal was mitigated to a demotion). Accordingly, the administrative judge properly concluded that the appellant was the prevailing party in the underlying appeal.

The administrative judge did not abuse her discretion in finding that the agency knew or should have known that it would not prevail in its removal action.

¶11 On review, the agency argues that the administrative judge erred in relying on her finding that the bank's justification for cancelling the appellant's travel card was not correct and her mischaracterization of the deciding official's deposition testimony as a basis for her conclusion that the agency knew or should

have known that it would not prevail on the merits; thus, fees were warranted in the interest of justice. APFR File, Tab 1 at 7-11, 15-16. The agency also argues that an award of fees was not in the interest of justice because, absent a law, rule, or regulation entitling the appellant to a reassignment, the agency could not anticipate that it would be ordered to reassign the appellant. *Id.* at 15-16.

¶12 An attorney fee award by the Board may be warranted in the interest of justice when, e.g.: (1) the agency engaged in a prohibited personnel practice; (2) the agency action was clearly without merit or wholly unfounded, or the employee was substantially innocent of the charges; (3) the agency initiated the action in bad faith; (4) the agency committed a gross procedural error; or (5) the agency knew or should have known that it would not prevail on the merits. *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420, 434-35 (1980).

¶13 Mitigation of the penalty alone does not create a presumption that attorney fees are warranted in the interest of justice. *Dunn v. Department of Veterans Affairs*, 98 F.3d 1308, 1313 (Fed. Cir. 1996). However, an agency's penalty selection is part of the merits of the case, and an award of attorney fees is warranted when the agency knew or should have known that its choice of penalty would not be sustained. *Gensburg v. Department of Veterans Affairs*, 80 M.S.P.R. 187, ¶ 7 (1998); *Lambert v. Department of the Air Force*, 34 M.S.P.R. 501, 505-07 (1987). When the Board sustains the charges in an adverse action appeal but mitigates the penalty based on evidence before, or readily available to, the agency at the time it took the action, an award of attorney fees is warranted in the interest of justice because the agency knew or should have known that its choice of penalty would not be upheld. *Capeless*, 78 M.S.P.R. at 621-22. The agency's arguments regarding the administrative judge's findings attack the underlying merits of the initial decision, which are not to be reevaluated in a proceeding on a motion for attorney fees. *Id.* at 622-23; *see also Yorkshire v. Merit Systems Protection Board*, 746 F.2d 1454, 1458-59 (Fed. Cir. 1984) (providing that an attempt to recharacterize the evidence and the

conclusions of the administrative judge in the underlying appeal is inappropriate during an adjudication of the attorney fees request).

¶14 The administrative judge's findings regarding whether the agency knew or should have known that its choice of penalty would not be upheld are consistent with her findings regarding the underlying appeal. AID at 3-11. In particular, the administrative judge relied upon her findings in the underlying appeal that the deciding official would not have upheld the removal had the appellant only had one returned payment to the bank, and that the appellant asserted in his reply to the proposed removal that the returned payments were in error and provided bank records to that effect. AID at 10-11. Accordingly, the administrative judge did not abuse her discretion in concluding that the agency knew or should have known that it would not prevail. *See, e.g.*, *Del Prete v. U.S. Postal Service*, 104 M.S.P.R. 429, ¶ 11 (2007) (concluding that the administrative judge properly found that attorney fees were warranted when the evidence warranting mitigation of the penalty was before the agency when it made its decision to remove the appellant), *overruled on other grounds by Driscoll*, 116 M.S.P.R. 662, ¶ 26.

The administrative judge did not err in declining to reduce the fees requested because the appellant did not obtain all of the relief he sought.

¶15 The agency also claims that the appellant is not entitled to any fees because he did not obtain the relief he sought. APFR File, Tab 1 at 16-17. When, as here, a party is entitled to an award of attorney fees, but did not succeed on every issue, the most important factor to be considered in assessing the reasonableness of a fee award is the results that were obtained. *Driscoll*, 116 M.S.P.R. 662, ¶ 21 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). When the appellant prevails only on the issue of an appropriate penalty, an award of fees is not "all or nothing." *Del Prete*, 104 M.S.P.R. 429, ¶ 15. If an attorney fee award is disproportionate to the appellant's overall degree of success, the fee award can be reduced either by identifying the hours associated with the unsuccessful issues or by "simply reduc[ing] the award to account for the limited success." *Id.*, ¶ 17

(quoting *Hensley*, 461 U.S. at 436-37). In a matter in which the appellant asserts a single claim for relief under 5 U.S.C. §§ 7513(d) and 7701 and seeks a single desired outcome; namely, that the Board set aside a removal action, he may raise alternative arguments in support of that effort. *Driscoll*, 116 M.S.P.R. 662, ¶ 26. The Board should consider whether the degree of success warrants an award based on all hours reasonably spent on the litigation and, if not, what adjustment is appropriate. *Id.*, ¶ 27. In doing so, the Board will weigh the significance of the relief obtained against the relief sought. *Id.* The administrative judge who decided the case on the merits is in the best position to determine whether the amount requested is reasonable. *Baldwin*, 115 M.S.P.R. 413, ¶ 23; *Sprenger v. Department of the Interior*, 34 M.S.P.R. 664, 669 (1987).

¶16 Here, the administrative judge did not explicitly address the degree of the appellant's success; however, we find that she did not err in finding that the appellant claimed a reasonable number of hours spent on the litigation. The appellant was unsuccessful in challenging the merits of the agency's charge but was successful in obtaining the reversal of the agency's removal action and a lesser penalty of reassignment. ID at 22. It is reasonable to award fees for the appellant's successful advancement of several arguments in support of his claim that the removal should be reversed, even if he did not prevail on all of his arguments. *See, e.g.*, *Taylor v. Department of Justice*, 69 M.S.P.R. 299, 304-05 (1996) (finding that the time spent on arguments that were not found to be persuasive should not be disallowed on the ground of lack of success when the appellant succeeded in mitigating the penalty of removal to a 90-day suspension). Accordingly, we do not disturb the administrative judge's finding that the fees were reasonable on this ground.

The administrative judge did not err in awarding fees at the rate counsel requested.

¶17 Finally, the agency argues that the administrative judge erred in awarding fees at a higher rate than the appellant agreed to pay his counsel and that the

appellant did not submit sufficient evidence that such a rate was customary. APFR File, Tab 1 at 17-19. The computation of a reasonable attorney fee award begins with an analysis of two objective variables: the attorney's customary billing rate and the number of hours reasonably devoted to the case. *Montalvo v. U.S. Postal Service*, 122 M.S.P.R. 687, ¶ 13 (2015); *Mitchell v. Department of Health and Human Services*, 19 M.S.P.R. 206, 208 (1984). An application to the Board for reasonable attorney fees must include specific evidence of the prevailing community rate for similar work. *Mitchell*, 19 M.S.P.R. at 210; 5 C.F.R. § 1201.203(a)(3). If an attorney fees applicant submits sufficient evidence concerning local billing rates, such as his fee agreement with his attorney specifying the requested rates or an affidavit from his attorney concerning his rates, he has satisfied his burden of proof regarding the reasonableness of the charged rate and there is no requirement that he also submit an affidavit from a local attorney concerning those rates, or otherwise show first-hand knowledge of the prevailing local rates. *Willis v. U.S. Postal Service*, 245 F.3d 1333, 1339-41 (Fed. Cir. 2001).

¶18 Where it is agreed that a specific fee is to be paid to an attorney for legal services rendered on behalf of an appellant in a Board case, the Board presumes that the amount agreed upon represents the maximum reasonable fee that may be awarded. *Caros v. Department of Homeland Security*, 122 M.S.P.R. 231, ¶ 7 (2015). This presumption is rebuttable by convincing evidence that the agreed-upon rate was not based on marketplace considerations and that the attorney's rate for similar work was customarily higher, or by showing that she had agreed to such a rate only because of the employee's reduced ability to pay and that the attorney's customary rate for similar work was significantly higher. *Id.*

¶19 Here, the appellant did not submit his fee agreements with either attorney he retained. However, he submitted a sworn affidavit stating that he had lost the retainer he signed with his first attorney in a fire, and that he was unable to obtain

another copy because his first attorney was deceased; moreover, he attested that he retained the attorney at a discounted rate of $300 and understood that the unreduced rate was $400. AFF, Tab 8 at 4-5. He further attested that, upon learning that his first attorney's firm had merged with another firm, he agreed to allow the second firm to represent him under the same conditions. *Id.* In a sworn affidavit, the appellant's attorney from the second firm attested that his hourly rate was $400, but he charged the appellant a discounted rate of $295 because "he was a Federal Employee and this Law Office was trying to assist him in whatever means possible." AFF, Tab 1 at 95. The appellant's second attorney averred that he had been awarded attorney fees at a rate of $400 in settlements and submitted two settlement agreements containing lump sum attorney fee payments, but the agreements did not contain the attorney's hourly rate. *Id.* at 97-104. The appellant's attorney also cited one nonprecedential decision in which he was successful in obtaining a fee award at a rate of $400 per hour. *Id.* at 94; *see Baerga v. Office of Personnel Management*, MSPB Docket No. NY-844E-12-0187-A-1, Addendum Initial Decision (July 1, 2016). Finally, the appellant submitted an affidavit from an attorney practicing in the same region, who attested that a rate of $375-500 was a typical hourly rate for individual clients in employment matters. AFF, Tab 1 at 116.

¶20 Such evidence, which is largely unrebutted by the agency, was sufficient for the administrative judge to find that the hourly rate charged to the appellant was not based on marketplace considerations, but was based on the appellant's reduced ability to pay the regular, higher fee, and that his attorney's customary fee for similar work in the same community was $400 per hour. *See Ishikawa v. Department of Labor*, 26 M.S.P.R. 258, 260 (1985) (finding that counsel successfully rebutted the presumption that the fee agreed upon between the attorney and employee was the maximum fee awardable by showing that she had agreed upon the rate only because of the employee's reduced ability to pay and that her customary fee for similar work was significantly higher). The agency has

not contested the rate for the work of the junior associate except to point out that the affidavit from outside counsel was completed prior to the associate's entry into the bar; however, the rate claimed for the work of the junior associate is lower than the range of rates discussed by outside counsel. AFF, Tab 1 at 96, APFR File, Tab 1 at 18. Accordingly, we discern no reason to disturb the administrative judge's finding that the rate claimed for junior counsel was reasonable.

ORDER

¶21 We ORDER the agency to pay the attorney of record fees in the amount of $108,225.00. The agency must complete this action no later than 20 days after the date of this decision.

¶22 We further ORDER the agency to tell the appellant and the attorney promptly in writing when it believes it has fully carried out the Board's Order and of the actions it has taken to carry out the Board's Order. We further ORDER the appellant and the attorney to provide all necessary information that the agency requests to help it carry out the Board's Order. The appellant and the attorney, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶23 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

NOTICE OF APPEAL RIGHTS[5]

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

[5] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's

disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[6] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

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[6] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD: /s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF TRISTAN L. LEAVITT

In

John Allan Scere v. Department of Homeland Security

MSPB Docket No. NY-0752-14-0157-A-1

¶1 In my Dissent in the appellant's compliance case, NY-0752-14-0157-C-1, I explained why I disagreed with my colleagues' decision to deny the agency's petition for review and affirm the compliance initial decision which granted in part the appellant's petition for enforcement and found the agency in noncompliance. I stated my view that, notwithstanding that the Board's order on the merits in this case rendered final the initial decision reversing the agency's action, the Board can raise subject matter jurisdiction at any time to collaterally attack a final judgment if the lack of jurisdiction directly implicates issues of sovereign immunity; that, in the underlying action, the administrative judge sustained the charge of failing to meet a condition of employment; that, absent an agency policy or regulation obligating reassignment, the administrative judge did not have the authority to reassign the appellant and was required to sustain the agency's removal action; that therefore she erred in finding that the removal action was unjustified and unwarranted, as required by 5 U.S.C. § 5596(b)(1) of the Back Pay Act, and, as such, she did not issue an enforceable order that would entitle the appellant to back pay. I stated that, for these reasons, I would grant the agency's petition for review, reverse the compliance initial decision, and deny the appellant's petition for enforcement.

¶2 Similarly, I also disagree with my colleagues' decision to deny the agency's petition for review and affirm the addendum decision which granted the appellant's motion for attorney fees. Because the administrative judge was required to sustain the agency's removal action, the appellant cannot support his claim that he is a prevailing party, a requirement to be entitled to attorney fees.

Therefore, I would grant the agency's petition for review, reverse the addendum initial decision, and deny the appellant attorney fees.

/s/

Tristan L. Leavitt
Member